Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

No. 98-6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY, CYPRUS FOOTE MINERAL COMPANY, AND CYPRUS AMAX MINERALS COMPANY,
Petitioners,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR KERR-McGEE CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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December 8, 1998

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BRIEF FOR KERR-McGEE CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS*[1]

The Kerr-McGee Corporation ("Kerr-McGee") is in a position almost identical to the position of petitioners in this case. It is a defendant in Navajo tribal court litigation in which tribe-member

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[1] The parties have consented to the filing of this brief, and their written consents have been filed with the Clerk. No counsel for a party in this case authored this brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

plaintiffs are seeking damages for alleged release of radioactive and toxic materials from a uranium mill that operated more than thirty years ago on land leased from the Navajo Tribe. As did the petitioners, Kerr-McGee sought and failed to win injunctive relief against the tribal court action on the ground that the Price-Anderson amendments to the Atomic Energy Act precluded the tribal court litigation. And like petitioners again, Kerr-McGee may face other tribal court actions arising from its long abandoned uranium milling operations on Navajo land.

Because this case may determine the extent to which the Price-Anderson amendments preclude tribal court jurisdiction over such actions and the extent to which *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), require that such jurisdictional issues be heard first in tribal court, Kerr-McGee files this *amicus* brief to support petitioners on the merits and to ensure that this Court is fully informed about the practical impact of decisions that require actions such as this one to be heard first in tribal courts.

THE SHIPROCK, NEW MEXICO, URANIUM LITIGATION

Amicus believes that an understanding of Kerr-McGee's experience in facing nuclear incident litigation in tribal court will be instructive to this Court in considering the legal arguments presented by this case. Accordingly, we include below a description of the relevant facts concerning the related tribal court action against Kerr-McGee and others.

Background. In 1953, as part of a program to encourage private companies to develop domestic supplies of uranium concentrate to fulfill urgent military requirements, the Atomic Energy Commission ("AEC") entered into an agreement with Kerr-McGee, pursuant to which Kerr-McGee built and operated a uranium mill near Shiprock, New Mexico, on reservation lands that Kerr-McGee leased from the Navajo Tribe. Under the terms of the lease, the Navajo Nation could not terminate the lease, except with the permission of the AEC. The AEC contract contained terms specifying when and how the mill would be built, the process

through which uranium concentrate would be produced from uranium-bearing ores, and permissible sources of ore. Kerr-McGee operated the Shiprock mill until 1962, followed by a company later acquired by Cyprus Foote Mineral Corp. ("Cyprus Foote"), which continued operations until 1968, when the mill was closed. In 1973 the lease for the mill site expired, and control of the site reverted to the Tribe.

The operation of the Shiprock mill was subject to pervasive regulation by the AEC under the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 *et seq.* In 1957, as explained more fully in the Brief for Petitioners, Congress enacted the Price-Anderson Act as an amendment to the Atomic Energy Act, in response to concerns expressed by "spokesmen for the private sector * * * that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 64 (1978). And in 1988, again as more fully explained in the Brief for Petitioners, Congress enacted the Price-Anderson Amendments Act of 1988 to establish an exclusive adjudicatory framework covering *any* claim of alleged injury from nuclear materials.

At the time that Kerr-McGee entered into the lease and the AEC contract, the Navajo courts asserted civil jurisdiction over Indian defendants, but not over non-Indian defendants. Accordingly, at that time, Kerr-McGee had no reasonable expectation of being sued in tribal court for actions relating to operation of the Shiprock mill. It was not until 1980, long after the mill had closed, that the Navajo courts asserted civil jurisdiction over actions in which the defendant "is a resident of Navajo Indian country, or has caused an action to occur in Navajo Indian country." Navajo Tribal Council Resolution CF-19-80, ¶ 1 (1980).[2]

The Tribal Court Action. In January 1995, the estates and certain relatives of two deceased members of the Navajo Nation,

[2] In its current form, the Navajo civil jurisdictional statute states that the District Courts of the Navajo Nation shall have jurisdiction over all civil actions "in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation." Navajo Nation Code tit. 7, § 253(B).

Lucy K. Farley and Julia Mae Kady, filed suit in Navajo tribal court against the former operators of the Shiprock mill, seeking damages under Navajo law and alleging that the mill had released "vast quantities" of radioactive and toxic materials from the mill causing them various injuries, including wrongful death. Complaint, *Kee Tom Farley, on behalf of the estate of Lucy K. Farley, et al. v. Kerr McGee et al.*, No. SR-CV-04-95 (Navajo D. Ct., Shiprock, N.M., Jan. 12, 1995). The suit was also filed on behalf of 1,000 John Does. Plaintiffs seek compensatory and punitive damages.

The U.S. District Court's Denial of Injunctive Relief. Kerr-McGee and Cyprus Foote promptly filed suit in federal district court seeking an injunction against the tribal court proceedings, on the grounds that the tribal court had no jurisdiction to consider nuclear tort claims in light of the Atomic Energy Act and its Price-Anderson amendments. Relying upon its understanding of the tribal court exhaustion rule of *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), the district court denied the requested injunction and stayed federal court proceedings. It ruled that (1) the tribal courts presumptively had jurisdiction; (2) the Price-Anderson amendments did not constitute an "express jurisdictional prohibition" of tribal court jurisdiction, within the meaning of the second *National Farmers* exception to the tribal court exhaustion rule, and (3) no extended comity analysis was necessary because the action was based on activities that took place on the reservation. *Kerr-McGee Corp. v. Farley*, 915 F. Supp. 273 (D.N.M. June 8, 1995).

The Tribal Court's Denial of Dismissal. Kerr-McGee and Cyprus Foote had also moved in Navajo tribal court to dismiss the complaint on jurisdictional grounds.[3] The tribal district court denied the motion in June 1996. (A copy of the tribal court order is attached as Appendix A.) With respect to the Price-Anderson amendments, the tribal court found that, because the amendments did not provide for exclusive federal court jurisdiction, the tribal

[3] This motion was filed in tribal court on June 5, 1995, after the federal district court had orally denied injunctive relief, but shortly before it issued its written opinion.

courts were permitted to exercise concurrent jurisdiction over nuclear incident litigation. Order at 14-16, App. A at 12a-13a. It also found that tribal court adjudication of a "common law tort" under tribal law does not conflict with the federal government's "complete control of the safety and 'nuclear' aspects of energy generation." Order at 16-17, App. A at 14a. Finally, the tribal court ruled that the action had not been shown to be a "public liability" action covered by the Price-Anderson Act because defendants had not shown that they were "licensed with the federal government" or "covered by federal indemnity insurance" and because plaintiffs had not named government agencies or officials as defendants. Order at 19-20, App. A at 16a-17a.[4] Accordingly, the tribal court permitted the plaintiffs' "common law tort" action under tribal law to proceed.

The Tenth Circuit Decision. One year later, the U.S. Court of Appeals for the Tenth Circuit affirmed the U.S. district court's denial of injunctive relief against the tribal court action. *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. June 25, 1997). The court of appeals observed, as an initial matter, that the tribal court claimants (and thus, by extension, the tribal court itself) erred in claiming that Price-Anderson did not apply to this case because Kerr-McGee lacked an indemnity agreement with the federal government (*id.* at 1504). It also agreed with Kerr-McGee and Cyprus Foote that Price-Anderson "on its face provides the sole remedy for the torts alleged in this case" (*id.*). It further agreed that Price-Anderson "does not include removal from tribal courts in its jurisdictional grant" but nevertheless declined to find at this time that Price-Anderson "created an exclusive enclave of federal adjudicatory control such that tribal courts lack jurisdiction to decide [Price-Anderson] claims, even those arising out of torts

[4] In fact, it was undisputed that Kerr-McGee and the Cyprus Foote predecessor company were licensed by the AEC and also clear that Price-Anderson does not require that plaintiffs name the government as a defendant. As a result, the tribal court claimants did not make either of these two arguments in the Tenth Circuit, where they contended that Price-Anderson was inapplicable only because of the absence of an indemnity agreement with the Government. As we explain below, the Tenth Circuit specifically rejected that argument.

against tribal members on the reservation" (*id.* at 1505). In addition, it found that *National Farmers* and *Iowa Mutual* on the one hand and *Montana v. United States,* 450 U.S. 544 (1981), and its successor decisions on the other hand continue to present "two arguably divergent strands of caselaw" that might need to be "reconcil[ed]" in cases of congressional silence (*id.* at 1506), rejecting the contention of Kerr-McGee and Cyprus Foote that this Court's then-recent decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), had itself reconciled those "divergent" strands. It also ruled that the holding in *Strate* that "[a]s to nonmembers * * * a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction" is inapplicable to the case, because it read *Strate* as limiting that holding to "lands over which the tribe has ceded authority and control to another sovereign for an indefinite period," (115 F.3d at 1506 n.4) and because the Price-Anderson amendments were "unclear on the extent to which state (or tribal) law may inform the issue of a nuclear tortfeasor's liability" (*id.* at 1507 n.6). Finally, it ruled that comity factors supported abstention (*id.* at 1507-09), in part because there appeared to be an open issue whether the substantive rule of decision "should be derived from Navajo tribal law," even though Price-Anderson expressly requires the application of federal law and, in some circumstances, "state" law, with no mention of "tribal" law (*id.* at 1507 n.6 & 1508).

This Court denied the petition of Kerr-McGee and Cyprus Foote for a writ of certiorari. 118 S. Ct. 880 (Jan. 26, 1998).

Subsequent Proceedings in Tribal Court. Following failure to obtain injunctive relief from the federal courts, the case has continued in tribal court. In November 1997, Kerr-McGee moved for reconsideration of the June 6, 1996 order declining to dismiss the complaint, relying on the intervening decisions of this Court in *Strate* and of the Tenth Circuit in *Kerr-McGee v. Farley*. In addition, in March 1998, Kerr-McGee asked the tribal court to certify the issue of subject matter jurisdiction to the Navajo Supreme Court for review. On April 28, 1998, the tribal court orally denied both motions. Without the requested certification, the tribal court's denial of the motion to dismiss the complaint is not an appealable order in the Navajo courts. *Chuska Energy Co. v. Navajo Tax Comm'n*, 5 Navajo Rptr. 98, 102 (1986). As matters

stand, accordingly, the case will proceed to trial on plaintiffs' tribal law theories.[5]

In an effort to narrow discovery, Kerr-McGee had filed a motion asking the tribal court to rule that the case would be governed by a federal standard of care, arguing that, under prevailing case law, compliance with contemporaneous government regulatory standards constitutes a complete defense in a nuclear tort case.[6] In a separate motion, Kerr-McGee also asked the tribal court to rule that it would adhere to the rule of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to assure that expert opinions in the case are scientifically reliable and relevant. In April 1998, the court denied both motions orally without prejudice, indicating that an opinion would follow, but leaving undecided what standard of care will govern the case and what gatekeeping function, if any, the tribal court will apply to expert opinions on the medical and scientific issues in the case. No written opinion has been issued as of this date.

Extensive discovery requests have been filed, and discovery remains ongoing. Numerous discovery issues remain unresolved at this time, including the extent of discovery relating to expert witnesses.[7] The tribal court has ordered that discovery shall be

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[5] When they answered the complaint, Kerr-McGee and Cyprus Foote had included a third-party complaint for indemnification against the United States and the Nuclear Regulatory Commission, in part because the AEC had for a time owned the mill tailings that were a subject of the lawsuit. On September 5, 1997, the tribal court denied a Kerr-McGee and Cyprus Foote motion for default judgment against the federal defendants, ruling that the court lacked jurisdiction over the federal defendants because Congress had not waived sovereign immunity as to actions against the United States in tribal courts.

[6] The motion pointed out that courts addressing the applicable standard of care have invariably held that federal regulations governing radiation exposure, not state law, dictate the standard of care for all claims under the Price-Anderson Act, regardless of the underlying tort theory. See, *e.g.*, *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 859-60 (3d Cir. 1991); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir. 1994).

[7] Because the plaintiffs claimed substantial amounts as compensation for sums paid to Navajo medicine men for healing ceremonies, Kerr-McGee had sought to verify these expenditures by seeking the names of the medicine men

completed by August 31, 1999, and has set a trial date of April 1, 2000.

SUMMARY OF ARGUMENT

In Part I of this brief, Kerr-McGee supports petitioners' argument that the Price-Anderson amendments to the Atomic Energy Act preclude tribal court jurisdiction over nuclear incident litigation—so that abstention in favor of tribal court proceedings "would serve no purpose other than delay." *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997). This conclusion follows not only from the language, structure, and history of the Price-Anderson amendments, but also from the unlikelihood that Congress intended tribal law—based as it is on tribal custom, tradition, and religious belief, as well as statute and judicial decision —to govern nuclear incident litigation.

While Kerr-McGee strongly supports petitioners' demonstration that this Court's existing tribal exhaustion doctrine, as clarified by *Strate*, requires reversal of the decision below, in Part II we urge this Court to make a general clarification of the tribal exhaustion doctrine and to rule that federal courts should normally decide contentions that a federal statutory scheme precludes tribal court jurisdiction over a particular class of claim, without abstention in favor of tribal courts. This clarification is supported by the abstention doctrine of *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), which this Court described

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and identification of the ceremonies performed. Plaintiffs declined to answer, claiming that this information is privileged under Navajo tradition. In July 1997, Kerr-McGee moved to compel answers to the questions, arguing that Navajo tradition does not recognize such a privilege. Having before it contradictory affidavits from Navajo medicine men on the issue, the court denied the motion and, following the procedure set forth in *In re Estate of Belone*, 5 Navajo Rptr. 161 (1987), ordered an informal pre-trial conference with two or three expert witnesses on Navajo tradition and custom to be appointed by the court. Order of Nov. 7, 1997. The tribal court later invited the parties to agree on one such expert, with the opportunity to offer rebuttal experts. Status Conf. of July 17, 1998, Tr. at 31. The parties have failed to agree and have referred the matter again to the tribal court, where it remains pending.

in *Iowa Mutual* as analogous to tribal exhaustion, and by the clarification of *Colorado River* abstention in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

Finally, in Part III, we describe the substantial burdens that a tribal exhaustion requirement imposes on defendants in nuclear incident litigation, with special reference to Kerr-McGee's experience in the Shiprock, New Mexico, uranium litigation. These burdens could be avoided by allowing federal courts to determine in the first instance whether a federal statute precludes tribal court jurisdiction, without requiring exhaustion of tribal court remedies.

ARGUMENT

I. The Price-Anderson Amendments to the Atomic Energy Act Preclude Tribal Court Jurisdiction Over Nuclear Incident Litigation.

Petitioners' brief has set forth in detail the comprehensive nature of federal regulation of the nuclear industry under the Atomic Energy Act of 1954, and the congressional decision in the Price-Anderson Amendments Act of 1988 to "create[ ] a federal cause of action which did not exist prior to the Act," *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 856 (3d Cir. 1991), and to assure federal court jurisdiction over all "public liability actions" as defined in the Act. As petitioners further explain, every other court of appeals that has addressed the issue has held that Price-Anderson establishes an exclusive federal remedy for nuclear-related torts, preempting any other theories of liability.[8] Under the circumstances it would be

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[8] *In re TMI Litig. Cases Consol. II*, 940 F.2d at 854 ("A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all*"; state-law claims preempted); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) ("Nieman can sue under the Price-Anderson Act, as amended, or not at all"; state-law claims preempted); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir. 1994) ("state regulation of nuclear safety, through either legislation or negligence actions, is preempted by federal law"); *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305 (11th Cir.) (endorsing *TMI*, *Nieman*, and *O'Conner*; state-law claims preempted), *petition for cert. filed*, 67 U.S.L.W. 3285 (U.S. Oct. 16, 1998) (No. 98-640). As explained above, the Tenth Circuit agreed with these

contrary to the statutory scheme itself and to all evidence of congressional intent to imply an unwritten exception that would permit either claims based on tribal law or federally-based Price-Anderson claims to be adjudicated in tribal court. Such adjudication, as petitioners state, is wholly at odds with both the language and objectives of Price-Anderson.

In light of this demonstration, it is also clear that precluding tribal court jurisdiction in these cases is a simple application of the ruling of this Court in *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997), that, "[a]s to nonmembers, * * * a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." As petitioners have demonstrated, Indian tribes have no legislative jurisdiction to regulate the nuclear activities of corporations engaged in the nuclear industry in any manner that would relate to these lawsuits. Accordingly, under *Strate*, they have no jurisdiction to adjudicate claims arising from such activities.

Moreover, Price-Anderson expressly provides for federal court jurisdiction and makes suits filed in State courts removable as a matter of right without providing for either tribal court jurisdiction or for removal from tribal court. 42 U.S.C. § 2210(n)(2). The primary purpose of this jurisdictional scheme is to facilitate consolidation and handling of all cases arising out a nuclear incident in a single federal court, see, *e.g.*, S. Rep. No. 100-218, at 13 (1987), and § 2210(n)(3) contains specific procedures for such consolidation and special handling. That purpose and the availability of those specific procedural provisions would be undermined if tribal court jurisdiction is not precluded.

As petitioners explain, the plaintiffs in this case have never argued that the provision of Price-Anderson that borrows elements "from the law of the State in which the nuclear incident involved occurs," where that law is consistent with the Price-Anderson Act, 42 U.S.C. § 2014(hh), can be read to borrow *tribal* law when the occurrence is on an Indian reservation. While this position had some appeal to the Tenth Circuit in *Farley*, see 115 F.3d at 1507

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statements. *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997) (Price-Anderson "on its face provides the sole remedy for the torts alleged in this case").

n.6 & 1508, it makes no sense to read "State" to mean "tribe" in the provision of the Act addressing borrowing of substantive law, while not reading it the same way in the closely-related provision that provides for removal of Price-Anderson cases from "State" court, 42 U.S.C. § 2210(n)(2).[9]

In this connection, there is another reason why it is unlikely that Congress would have intended to "borrow" from tribal law for Price-Anderson claims: the extent to which tribal law differs from the common law of torts that is virtually universal in the States. To take the example of the tribe on whose reservation both this case and the related Tenth Circuit decision in *Farley* arose, the Navajo Nation takes pride in having developed and applied a body of tribal law that is based on the customs of the Navajo people and their religious beliefs, and that is intended to be different from customary

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[9] The Tenth Circuit's statement in *Kerr-McGee Corp. v. Farley*, 115 F.3d at 1505, that the Price-Anderson removal provision does not permit removal from tribal courts is consistent with its prior decision that the general removal statutes, 28 U.S.C. §§ 1441-44, permit removal from State courts only, and not from other courts (absent specific statutory provision). *Becenti v. Vigil*, 902 F.2d 777 (10th Cir. 1990) (no removal under § 1442 from tribal courts); see also *Guam v. Landgraf*, 594 F.2d 201 (9th Cir. 1979) (no removal under § 1443 from courts of the Territory of Guam). Federal court review of cases tried in tribal court is not available in this Court by way of writ of certiorari because 28 U.S.C. § 1257 authorizes such review only of final judgments from the highest court of "a State" and because other provisions relating to territories do not mention tribal courts. *E.g.*, 28 U.S.C. § 1258 (certiorari review of decisions of Supreme Court of Puerto Rico). This Court has not yet resolved the extent to which review of federal law issues on the merits, decided in tribal court litigation, may be obtained in federal district court. Compare *National Farmers*, 471 U.S. at 856 (stating that the exhaustion rule exists to allow tribal courts the chance to develop the record "before either the merits or any question concerning appropriate relief is addressed") with *Iowa Mutual*, 480 U.S. at 19 (stating that "proper deference to the tribal court system precludes relitigation of issues raised [by plaintiffs' bad faith claim] and resolved in the Tribal Courts"); see also Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 Kan. L. Rev. 241, 271-81 (1998) (discussing lower court cases concerning post-exhaustion review). A ruling that nuclear incident litigation must be heard by state or federal courts in the first instance ensures federal court review of the federal law issues presented by Price-Anderson claims.

"Western" law. The following quotation from an article by an Associate Justice of the Navajo Supreme Court is illustrative:

> "The Navajo common law * * * is a corpus of law based upon the values and norms of the Navajo people, as expressed in their customs, traditions, usages and morals. * * * The Navajo common law is stated in creation beliefs, religious ceremonies, stories and practices which are centuries-old, and they help Navajos survive under changing circumstances." Raymond D. Austin, *Incorporating Tribal Customs and Traditions into Tribal Court Decisions*, in Federal Bar Association, 1992 Indian Law Conference 71, 71.

An article more specifically addressing tort law, by the Chief Justice of the Navajo Nation, is also illustrative:

> "[T]raditional Navajo tort law is based on *nalyeeh*, which is a demand by a victim to be made whole for any injury. In the law of *nalyeeh*, one who is hurt is not concerned with intent, causation, fault, or negligence. If I am hurt, all I know is that I hurt; that makes me feel bad and makes those around me feel bad too. I want the hurt to stop, and I want others to acknowledge that I am in pain. The maxim for *nalyeeh* is that there must be compensation so there will be no hard feelings. This is restorative justice. Returning people to good relations with each other in a community is an important focus. Before good relations can be restored, the community must arrive at a consensus about the problem." Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. Rev. 175, 184-85 (1994).

And later in the same article Chief Justice Yazzie states:

> "Navajo case outcomes are often a kind of absolute liability where helping a victim is more important than determining fault. Distributive justice is concerned with the well-being of everyone in a community. For instance, if I see a hungry person, it does not matter whether I am responsible for the hunger. If someone is injured, it is irrelevant that I did not hurt that person. I have a responsibility, as a Navajo, to treat everyone as if he or she were my relative and therefore to help that hungry person. I am responsible for all my relatives. This value which translates itself into law under the Navajo system of justice is that everyone is part of a community, and the resources of the community must be shared with all. Distributive justice abandons fault and adequate compensation (a fetish of personal injury lawyers) in favor of assuring well-being for everyone. This affects the legal norms surrounding wrongdoing and elevates restoration over punishment." *Id.* at 185 (footnotes omitted).

A recent opinion of the Navajo Supreme Court (by Chief Justice Yazzie) makes the same general point:

> "When there is an injury, Navajo common law requires the negotiation of the amount of *nalyeeh* [roughly, the amount of payment] based upon the effects of the injury and ability of the tortfeasor and his or her relatives to make things right. The Navajo maxim is that it should be enough 'so there will be no hard feelings.'" *Benalli v. First National Insurance Co.*, No. SC-CV-45-96, slip op. at 16 (Navajo Oct. 26, 1998).

The Navajo Nation has thus developed and is continuing to develop a body of tribal law suited to its people, their customs, traditions, and needs. Many other tribes are doing the same, with results that are very different from both Navajo law and the law of the States.[10] Under the circumstances, it is implausible that

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[10] See, *e.g.*, Judith V. Royster, *supra* note 9, at 247-48, and articles cited therein, and Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. Rev. 225 (1994), and articles cited therein. See also James W. Zion, *Searching for Indian Common Law*, in Indigenous Law and the State 121, 129 (Bradford W. Morse & Gordon R. Woodman eds. 1988): "[Substantive Indian common law] exists in a form that is not always easily recognized, consisting of the sayings taught in childhood, the prayers of ceremonies, hero stories, animal stories, and humorous tales about members of the community. These form, in the mind of the adult Indian, a body of law which he or she may be hard-pressed to articulate in terms of actual rules, but which are there in the mind. This is why Indians, and only Indians, can truly have a comprehensive knowledge of their law." In Navajo tribal courts, tribal

Congress contemplated that toxic tort litigation against non-Indian corporations that had contracted with the Government to aid the development of nuclear power and nuclear weapons would be governed, even in part, by such a diverse set of legal principles, and that such principles would be developed on a case-by-case basis in tribal courts that have long been underfunded, before non-Article-III judges, before being relitigated in whole or in part in federal court.[11]

II. Exhaustion of Tribal Court Remedies Should Not Be Required When a Federal Statute Precludes Tribal Court Jurisdiction.

Petitioners argue that the Ninth Circuit's application of the tribal exhaustion requirement of *National Farmers* and *Iowa Mutual* was erroneous because it disregarded the important federal interests that caused Congress to adopt Price-Anderson and failed to follow this Court's most recent decision on that doctrine, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). In this part, we urge this Court to clarify the tribal exhaustion doctrine more generally by ruling that federal courts should normally decide, without abstention, contentions that a comprehensive federal statutory scheme precludes tribal court jurisdiction over a particular class of claim. Such a clarification would not overrule *National Farmers* or *Iowa Mutual*, but simply require attention to the circumstances under which those cases arose and the different considerations that arise when a federal statute precludes tribal court jurisdiction.

National Farmers and *Iowa Mutual* both arose from traffic accidents on land located on Indian reservations. Both involved the

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customs may be proved by a variety of methods, including judicial notice and expert testimony. See, *e.g.*, *In re Estate of Belone*, 5 Navajo Rptr. 161, 165-66 (1987).

[11] For a recent anthropological survey of tribal courts, see Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts* (pt. I), 46 Am. J. Comp. L. 287 (1998) (noting at 322 that some reservations have no age, experience, or law background qualifications for their judges). See also Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. Rev. 225, 237-40 (1994) (discussing, among other things, underfunding of tribal courts).

adjudication of non-federal tort claims. Neither involved a specific federal regulatory regime that may have precluded tribal court jurisdiction. Indeed, the *National Farmers* decision specifically relied on the absence of controlling federal legislation:

> "[A]lthough Congress' decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian Country supported the holding in *Oliphant* [*v. Suquamish Indian Tribe*, 435 U.S. 191 (1978),] there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation." 471 U.S. at 854.

Accordingly, although the Court in *National Farmers* held that the question of tribal court jurisdiction in the case was a federal question under 28 U.S.C. § 1331, 471 U.S. at 852, that federal question was to be answered first by the tribal court.

National Farmers did not hold, however, that such abstention was required when it was claimed that a specific federal statute preempted tribal court jurisdiction over the type of dispute at issue. It is true that, in holding that the federal courts should have abstained from ruling on tribal court jurisdiction in *National Farmers*, the Court made a broad statement that can be read to require abstention even when a federal statute may provide the answer:

> "Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
>
> "We believe that examination should be conducted in the first instance in the Tribal Court itself." 471 U.S. at 855-56 (footnote omitted).

In context, however, this statement should not be taken as deciding whether a federal court should abstain when a litigant claims that a

federal regulatory scheme specifically addressing the type of claim at issue precludes tribal court jurisdiction.

In addressing that question, the Court should look to principles developed in the abstention doctrines that govern federal court proceedings in the face of ongoing state court proceedings, because both *National Farmers* and *Iowa Mutual* relied on cases reflecting those doctrines as providing useful analogies. And those cases point toward the rule that we propose.

The *National Farmers* decision is sparse in explaining its relationship to older abstention doctrine. Nevertheless, in setting forth three exceptions to its tribal court abstention doctrine—(1) "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,'" (2) where the action is patently violative of express jurisdictional prohibitions, or (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction," 471 U.S. at 856 n.21—the Court cited *Juidice v. Vail*, 430 U.S. 327, 338 (1977). *Juidice* is an important case addressing the application of the abstention doctrines of *Younger v. Harris*, 401 U.S. 37 (1971), in the context of a pending state civil proceeding.[12] Thus, the Court in *National Farmers* was drawing on the older doctrine governing the circumstances in which it is appropriate for a federal court to abstain in favor of ongoing state proceedings, while taking account of appropriate differences in light of long-standing respect for tribal sovereignty.

Iowa Mutual set forth a further doctrinal analogy, drawing again on precedent from abstention doctrine in the federal-state context:

> "Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. In this respect, the rule is

[12] In *Juidice*, the Court pointed out that it had noted in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), that *Younger* principles do not apply "'where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statue is flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.'" 430 U.S. at 338, quoting *Huffman*, 420 U.S. at 611 (other internal quotation marks omitted). The *National Farmer* exceptions were obviously drawn, in substantial part, from this precedent.

> analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976): even where there is concurrent jurisdiction in both the state and federal courts, deference to state proceedings renders it appropriate for the federal courts to decline jurisdiction in certain circumstances. In *Colorado River*, as here, strong federal policy concerns favored resolution in the nonfederal forum." 480 U.S. at 16 n.8.

This footnote confirms that the tribal exhaustion doctrine is a particular application of more general abstention notions that arose to address the common occurrence of concurrent proceedings in state and federal courts.[13]

The citation to *Colorado River* is particularly striking because the general rule of that case is that only "exceptional circumstances" justify a federal court in declining to decide a case properly within its jurisdiction. And, in fact, the *Colorado River* analogy provides no support for federal court abstention when a specific federal statutory scheme precludes tribal court jurisdiction. In *Colorado River*, the jurisdiction of the state courts to adjudicate the water rights at issue was never in dispute. After finding that *federal* court jurisdiction had not been divested by the federal statute at issue, the Court proceeded to rule that the merits of the dispute, not any jurisdictional issue, were better adjudicated in state court proceedings, under the "exceptional circumstances" test for federal court abstention. 424 U.S. at 813. One reason for the Court's ruling was the "clear federal policy" evinced by applicable federal legislation—"the avoidance of piecemeal adjudication of water rights in a river system," *id.* at 819—combined with the fact of ongoing state proceedings in which all claims could be

[13] While the tribal exhaustion requirement is thus linked to the abstention doctrines governing state and federal courts, there are, of course, differences. 28 U.S.C. § 2283 specifically limits federal court power to enjoin proceedings in state court. There is no similar Congressional limitation on federal court power to enjoin proceedings in tribal courts. Interconnections between the law governing state-federal relations and that governing tribal-federal relations are discussed in Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671 (1989).

adjudicated.[14] Other reasons were the extent to which state proceedings had gone forward, the extensive involvement of state water rights issues, the comparative convenience of the forums, and the Government's existing participation in related state proceedings. This case thus counsels close attention to the kind of practical concerns that petitioners argued in this case and that Kerr-McGee argued in the *Farley* litigation. This kind of attention might well point to abstention in routine traffic cases such as *National Farmers* and *Iowa Mutual*, and cases of a similar nature. But it points to a prompt federal court decision on the jurisdictional question whether a specific federal statutory scheme precludes tribal court jurisdiction.

Indeed, this Court later clarified *Colorado River* abstention to emphasize the importance of whether federal law provides the rule of decision in the federal case. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), this Court reaffirmed what it termed "*Colorado River*'s exceptional circumstances test," 460 U.S. at 16, and clarified that another important factor in *Colorado River* abstention is whether "federal law provides the rule of decision on the merits." *Id.* at 23. Indeed, the Court specifically concluded: "Although in some rare circumstances the presence of state-law issues may weigh in favor of [surrender of federal court jurisdiction], * * * the presence of federal-law issues must always be a major consideration weighing against surrender." *Id.*

This passage from *Moses H. Cone Memorial Hospital* does not concern the law governing the underlying dispute between the parties. It concerns the issue of arbitrability of the underlying dispute under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*—an issue that was pending in state court—and the entitlement of the party seeking federal court relief to an order under the Federal Arbitration Act compelling arbitration. The district court had stayed the federal court action out of deference to the state court proceeding, which included the arbitrability issue. The court of

[14] Similarly, here the federal policy is to permit all tort claims arising from a nuclear incident to be decided in a single federal court proceeding.

appeals and the Supreme Court agreed that the district court stay was improper under *Colorado River*, as clarified.

Colorado River as clarified by *Moses H. Cone Memorial Hospital* thus counsels in favor of federal courts ruling on claims that a federal statutory scheme precludes tribal court jurisdiction, rather than abstaining. Arbitrability is a jurisdictional issue because it remits the underlying dispute between the parties to a specific, non-judicial forum. By analogy, an allegation that a federal statutory scheme such as Price-Anderson precludes tribal court jurisdiction is a federal statutory issue that should be decided by federal courts without abstention.

Because *National Farmers* and *Iowa Mutual* were applications of comity principles with a long history in federal jurisdiction—and a history that has emphasized practical considerations and favored federal courts deciding federal statutory questions—it is not surprising that this Court in *Strate* made clear that the *National Farmers* requirement is not a rigid rule with three and only three defined exceptions:

> "When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. * * * Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement * * * must give way, for it would serve no purpose other than delay." 520 U.S. at 459 n.14.

If that statement is correct for a case like *Strate*, where no federal regulatory scheme covered the type of dispute at issue, it is all the more clear that the tribal exhaustion requirement "must give way" where a federal regulatory scheme precludes tribal court jurisdiction. This is particularly so in cases such as this one where the jurisdictional issue turns upon the language, purposes, and history of a federal statute and does not involve unresolved issues of tribal sovereignty, the interpretation or applicability of Indian

treaties, or other considerations as to which tribal courts might have some special insight or expertise. In such cases, requiring exhaustion "would serve no purpose other than delay."

III. Exhaustion of Tribal Court Remedies Is Exceedingly Burdensome in Nuclear Tort Cases.

Clarification of the tribal exhaustion rule in the manner suggested above or acceptance of petitioner's argument that tribal exhaustion is inappropriate in Price-Anderson cases would avoid the unnecessary expense and delay resulting from requiring exhaustion in nuclear tort cases. The facts of the Shiprock lawsuit against Kerr-McGee and Cyprus Foote provide a vivid example of those burdens.

As in the federal system, a denial of a motion to dismiss for lack of jurisdiction is not an appealable order in the Navajo courts. *Chuska Energy Co. v. Navajo Tax Comm'n*, 5 Navajo Rptr. 98, 102 (1986). In the Shiprock litigation, the tribal district court also denied Kerr-McGee's motion to certify the jurisdictional issue for interlocutory appeal. Accordingly, because it was required to exhaust tribal court remedies, Kerr-McGee has no remedy for an improper exercise of tribal court jurisdiction, except to litigate the case to conclusion and then appeal to the Navajo Supreme Court any adverse decision on jurisdictional grounds, as well as on any grounds relating to the merits.[15] Once those appellate proceedings are over, Kerr-McGee may, if still unsuccessful, revive its federal court action and obtain a federal court ruling on the issue of tribal court jurisdiction. If the federal court rules, as Kerr-McGee has argued, that the tribal court lacked jurisdiction from the very beginning, it will enjoin enforcement of any adverse tribal court

[15] The Court ruled in *Iowa Mutual* that exhaustion of tribal remedies was not complete "[u]ntil appellate review is complete." 480 U.S. at 17. The burdens of the tribal exhaustion requirement would of course be substantially less if the Court were to limit that ruling to cases in which no one contends that a comprehensive federal statutory regime precludes tribal court jurisdiction. In cases such as this one, requiring tribal court defendants to ask the tribal court to dismiss for lack of jurisdiction would impose no significant burden, but the unnecessary burdens of an improper exercise of jurisdiction may begin to be substantial as soon as the tribal court permits the action to go forward.

judgment, and plaintiffs will have to initiate a new Price-Anderson action in state or federal court.

This process will inevitably take a considerable amount of time and expense. As explained above, in the Shiprock litigation, which began in 1995, a trial date has been set for April 2000, but there is of course no assurance that the tribal court proceedings will be completed on schedule. Appellate proceedings can be expected to take at least another year. Thus, exhaustion of tribal court remedies will take at least six years, and there is a very real likelihood that it will take considerably more. Moreover, the tribal district court denied reconsideration of its conclusion that the plaintiffs may proceed under tribal common law rather than under Price-Anderson, despite the Tenth Circuit's contrary opinion. And the tribal district court has put off determination of such basic questions as the applicable standard of care and whether expert testimony will be governed by the *Daubert* standard. See pp. 6-8, *supra*.

The Kerr-McGee litigation is not atypical in requiring long and expensive proceedings in the trial court. The Court can take judicial notice of the fact that nuclear incident litigation typically involves complicated issues of causation and damage, requiring careful attention to the applicable science as well as to the facts of exposure. For example, in *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984), *rev'd*, 816 F.2d 1417 (10th Cir. 1987), a suit by individual plaintiffs against the United States under the Federal Tort Claims Act for cancer or leukemia allegedly caused by the AEC testing of atomic devices prior to 1963, the case took five years from complaint to judgment, including a three-month trial (with a 7,000-page transcript), the testimony of 98 witnesses, and more than 1600 documentary exhibits. The district court opinion takes up 226 pages of the federal reporter. For another example, the Hanford Nuclear Reservation litigation under Price-Anderson and CERCLA is in its eighth year, having partly survived dispositive motions in a recent opinion assessing plaintiffs' scientific evidence. *In re Hanford Nuclear Reservation Litigation*, No. CY-91-3015-AAM, 1998 U.S. Dist. LEXIS 15028 (E.D. Wash. Aug. 21, 1998). This opinion takes up 1076 pages on the cited computer service.

A defendant like Kerr-McGee cannot be expected to expedite tribal court proceedings by defaulting after losing on the

jurisdictional issue. The stakes in nuclear incident litigation are too high for a defendant to risk all on eventually persuading the federal court to enjoin enforcement of an adverse tribal court judgment. Thus, the tribal court litigation will inevitably be a full adversary proceeding, with extensive discovery and lengthy trial and post-trial proceedings. All this effort will be for nothing if, as Kerr-McGee has argued, the tribal court lacks jurisdiction.

The cost to a defendant like Kerr-McGee in going through long and expensive trial and appellate proceedings that may be unnecessary will be enormous. Plaintiffs face the same burden. Even though the plaintiffs in this case elected to sue in tribal court, we doubt that it makes sense to put plaintiffs in general to the difficult choice of passing up a potentially available tribal court remedy or going through an entire tribal court proceeding that may ultimately be thrown out.

Moreover, relegating both parties to a necessarily long and expensive tribal court proceeding raises the danger that important witnesses will die or become unavailable before proper state or federal court proceedings are brought.

In short, whatever formulation of the tribal exhaustion rule emerges from this case, the Court should take the occasion to make clear that the proper exercise of comity takes account of the burdens of exhausting tribal court remedies.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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December 8, 1998

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK, NEW MEXICO

KEE TOM FARLEY, *et al.*,	)	No. SR-CV-103-95
Plaintiffs,	)	
vs.	)	ORDER
KERR McGEE, *et al.*,	)	
Defendant.	)	June 7, 1996

THIS MATTER came on for consideration of the Defendant's Motion to Dismiss filed on June 05, 1995 which was heard on October 18, 1995. Defendants moved this Court to dismiss this action for lack of subject matter jurisdiction and failure to state a claim upon which this Court may grant relief. As grounds for dismissal, Defendants assert that maintenance of this action in this forum violates express requirements of a comprehensive federal law, the Price-Anderson Act 42 U.S.C. Section 2011 *et seq*.

Plaintiffs filed said complaint on January 12, 1995, seeking damages for wrongful death and injury allegedly resulting from exposure to vanadium and uranium processed at a uranium mill operated by Defendants in Shiprock, New Mexico. On April 26, 1995, Defendants filed a Complaint for Preliminary Injunction and Declaratory Judgment in the United States District Court for the District of New Mexico (CIV 95-0438-MV). Defendants requested the United States District Court to permanently enjoin Navajo Tribal proceedings and declare that the Navajo Tribal Court is without jurisdiction to hear and adjudicate any claims asserted against them in tribal court. Defendants argued that this case constitutes a "public liability" action that is, [2] "any legal liability arising out of or resulting from a nuclear incident" and therefore; the Price Anderson Act applies to this case. Defendants further asserted that

this Tribal Court does not have jurisdiction to resolve nuclear torts because the Price Anderson Act created a federal cause of action to resolve such disputes.

On June 8, 1995, U.S. District Judge Martha Vasquez, in a Memorandum Opinion And Order ruled that, in accordance with the tribal abstention doctrine, the U.S. District Court was required to abstain from further action in this matter until the Tribal Court has ruled on the question of jurisdiction. Defendants then filed a Motion to Dismiss in this Court that was heard on October 18, 1995.

Defendants are foreign corporations that operated a uranium processing mill in Shiprock, New Mexico from 1952 to 1973. The mill was located on tribal trust land within the territorial jurisdiction of the Navajo Nation. Plaintiffs are members of the Navajo Tribe who either worked at the uranium processing site and/or resided within the immediate area of the processing mill. Plaintiffs allege that the deceased, Lucy Farley and Julia Kady, died from exposure to vanadium and uranium processes and various radioactive substances and heavy metals. Plaintiffs are seeking damages for negligence and wrongful death and other tort damages stemming from the alleged operation of the processing mill.

As grounds for dismissal, Defendants assert this Court cannot assert jurisdiction over nuclear torts allegedly committed by Defendants because the federal government has preempted the entire field of nuclear safety through Congressional enactment of the Price Anderson Act. Defendants contend that the Price Anderson Act expressly ceded limited power to the states and that no express delegation was granted to tribal courts and that none can be implied.

[3] Secondly, Defendants argue that Congress created an exclusive method for resolving nuclear tort claims. To wit: the Price Anderson Act requires the filing of any suits involving injury from exposure to nuclear materials to be filed in federal courts or in state courts with absolute and unqualified right of removal to federal court. Defendants further allege no express delegation was granted to tribal courts and none can be implied. Finally, the Defendants argue that comity requires the tribal courts to defer to federal courts.

The arguments Defendants pose is fundamentally flawed because it fails to reconcile their theories with Indian Sovereignty principles as established by Federal Indian policy and United Supreme Court decisions. To determine whether this Court has subject matter jurisdiction, this Court is obligated to carefully examine the Price Anderson Act in light of inherent tribal sovereignty, relevant statutes, case law, and federal policy to determine whether this Court has jurisdiction.

INHERENT TRIBAL SOVEREIGNTY

This history of tribal self-government forms the present right of tribes to govern their members and territories. Although extensive preexisting tribal sovereignty has been limited by tribal inclusion with the United States, Tribal powers of self-government are recognized by the U.S. Constitution, federal legislation, treaties, U.S. Supreme Court decisions, and administrative practice. Such recognition is protected by the federal government to insure continued viability of Indian self-government insofar as governing powers have not been limited or extinguished. Indian Tribes are sovereign in that they are political self governing entities whose powers can be circumvented only by Congress. *U.S. v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L. Ed. 2d 303, 313 (1978). That is, a Tribe retains its sovereignty until **[4]** Congress divests that sovereignty.

The most basic principle of Indian law is that those powers which are lawfully vested in an Indian Tribe are inherent powers of a limited sovereignty which has never been extinguished. *Id.* at 322-323. Thus, Tribal powers are not delegated powers granted by express acts of Congress. Tribal powers that currently remain are those powers that tribes have always had and remain within the domain of the tribe. In *Oliphant v. Sequenist Indian Tribe*, 435 U.S. 191 (1978) the Supreme held that "Indian tribes still possess these aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

TRIBAL CIVIL JURISDICTION OVER NON-INDIANS

The Supreme Court in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed. 2d 493 (1981) articulated the principle

that underlies tribal court civil jurisdiction over non-Indians. The Crow tribe of Montana, by a tribal regulation sought to prohibit hunting and fishing within its reservation by anyone who is not a member of the tribe. The tribal regulation applied to nonmembers of the tribe that included lands within the reservation owned in fee simple by non-Indians. Meanwhile, Montana continued to assert its authority to regulate hunting and fishing by non-Indians within the Crow reservation. The United States in its own right and as a fiduciary for the tribe filed an action seeking declaratory judgment quieting title to the bank of the Big Horn River and to establish that the tribe and the United States have sole authority to regulate hunting and fishing within the reservation. They sought to force Montana to obtain tribal permission before issuing hunting and fishing licenses for use on the reservation.

The *Montana* court addressed the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians within its reservation owned in fee **[5]** simple by non-Indians. In doing so, the *Montana* court analyzed the scope of a tribe's power to exert civil jurisdiction over non-Indians within their reservation boundaries by stating unequivocally that "to be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 209.

The *Montana* court then announced that tribes may regulate the activities of non-members via taxation, licensing, or other means. A tribe may also exercise civil jurisdiction over non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or health or welfare of the tribe. *Id.* at 209.

NAVAJO TRIBAL AUTHORITY

The Navajo Nation is a sovereign and self-governing society that predates the coming of the Europeans and the United States Constitution. The United States government recognized the Navajo

Nation's sovereign status when it entered into two treaties with the Navajo Nation in 1850 (9 Stat. 974) and 1868 (15 Stat. 667). Treaty making between Indian tribes and Europeans and latter the United States government represented an agreement between two sovereign independent nations. *F. Cohen, Handbook of Federal Indian Law* 232 (1982). The Court of Appeals of the Navajo Nation (now the Supreme Court) pronounced this principle as follows: "When sovereign Indian nations dealt with the United States by treaty, they did so in an international law sense. Further, they (tribes) did not receive their lands and powers **[6]** from the United States but only ceded lands and privileges to it." *Benally v. John*, Nav.R. 39, 4 N.L.R. 22 (Nav.Ct.App. 1983).

Although the Navajo Nation exercised self-government long before the arrival of Europeans, a Tribal Council was not formally established until 1926. The Navajo Tribal Council established the Navajo tribal courts and granted them authority to exercise civil jurisdiction over all actions that occur within its territorial jurisdiction. This authority to exercise jurisdiction is coextensive with that of the Navajo Nation as a sovereign. *Deal v. Blatchford*, 3 Nav.R. 159, 3 N.L.R. 91 (Nav.Ct.App. 1982).

The Navajo Nation's declaration of civil jurisdiction is found at Title 7 of the Navajo Tribal Code, section 253 (2) (1985) which provides: The District Courts of the Navajo Nation shall have original jurisdiction over . . . . all civil actions in which the Defendant is a resident of Navajo Indian Country or has caused an action to occur within the territorial jurisdiction of the Navajo Nation. Territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, which is defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependant Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Tribe or any band of Navajo Indians. 7 N.T.C. Sec. 254.

Thus, the Navajo Tribal Code grants tribal courts jurisdiction over civil cases involving non-Indians if the action in which the defendant has caused an action to occur within the territorial jurisdiction of the Navajo Nation. It is undisputed that Defendants

obtained a license to operate a uranium mill in Shiprock, New Mexico from 1952 through 1973. It is also an undisputed fact that Shiprock is located within the [7] territorial jurisdiction of the Navajo Nation. Plaintiffs alleged that Defendant's uranium mill operation resulted in sickness and death; therefore, the authority to exercise jurisdiction by this Court is satisfied in accordance with 7 N.T.C. Sections 253, 254.

Moreover, the Navajo Nation "has the power to exercise civil authority over the conduct of non-Navajos where the conduct threatens or has some direct effect on the political integrity of the Navajo Nation." *U.S. v. Montana, Supra.* The conduct Defendants allegedly committed has a direct effect on the political integrity of the Navajo Nation. Political integrity is dependent on the respect, honesty and faith the Navajo people entrust in the Navajo government to protect their rights in accordance with Navajo common law. A basic Navajo common law is that one who is found responsible for inflicting harm on another person must pay the victim for the harm to restore harmony. If the Navajo tribal courts cannot provide a forum to address allegations of tortuous conduct and provide remedies where appropriate, the political integrity of the tribal government is seriously compromised.

Furthermore, tribal Courts have civil jurisdiction over non-Indians who enter consensual relationships with the tribe or its members if the cause of action arises on the reservation. *U.S. v. Montana, Supra.* Defendants admitted that they entered into a lease with the Navajo Nation to operate the uranium mill. Defendants freely decided to enter a consensual agreement with the Navajo Nation to operate the mill in Shiprock. Any business deals, contracts, or leases made with the Navajo Nation that are designed to operate on the Navajo Nation subject those businesses to Navajo tribal jurisdiction. *Arizona Public Services v. Office of Navajo Labor Relations*, Slip. Op. A-CV-08-87 (Navajo Supreme Ct. 1990).

In conclusion, Navajo Nation tribal courts have the authority and power to [8] exercise jurisdiction over non-Indians where a claimant alleges that a non-Indian committed a tortuous act within the exterior boundaries of the Navajo Nation.

Any other conclusion would diminish the Navajo tribal court's ability to play an important and essential role in tribal self-government, contrary to Congressional policy of supporting Indian self-government and self determination by recognizing that tribal courts constitute an integral part of tribal sovereignty. *In National Farmers Union Insurance Co., v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed. 2d 818 (1985), the Supreme Court articulated the policy of encouraging development of tribal courts by making them the primary focus for adjudication where tribal jurisdiction is being challenged so that they have the first opportunity to evaluate the factual and legal basis for the challenge. *Id.* at 856-857. The Supreme Court in *Iowa Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987), reaffirmed that Indian tribal courts have a role in tribal sovereignty and self-government. And unlike criminal jurisdiction, tribal civil jurisdiction over activities of non-Indians on reservation trust land presumptively lies in tribal Court unless affirmatively limited by specific treaty provisions or federal statute.

APPLICABILITY OF GENERAL JURISDICTION STATUTES

To determine whether Plaintiff's claims are preempted by a comprehensive federal law, the Price Anderson Act, so as to preclude this Court from exercising jurisdiction, the Court needs to examine ". . . legisiative history of the federal statute at issue and language expressed on the face of the statute to determine whether congress has divested tribal courts of jurisdiction." *Pela v. Peabody Coal Company*, Slip. Op. A-CV-78-89 (Navajo Nation Supreme Ct. 1990). It is essential for this Court to examine the Price Anderson Act to discern how it affects the sovereignty of the Navajo [9] Nation with the preservation of tradition and culture in mind.

Federal General Jurisdictional statues do not apply to tribes absent specific language which include the tribes. In *Becenti v. Vigil*, 902 F.2d 777 (10th Cir. 1990), petitioner, at the outset, filed a petition against employees of the Bureau of Indian Affairs. Defendants were successful in removing the case to the federal district court who in turn, dismissed the complaint for lack of jurisdiction. Plaintiff appealed to the 10th Circuit Court of Appeals

which held that removal was not authorized by 28 U.S.C. Sec. 1442 (a)(1), the statue providing for removal from "state court" of actions against officers of the United States or agency thereof. The Court in *Becenti* stated "[this section] speaks only of removal of actions brought in "state" courts and cited several cases that have interpreted the "state courts" language in both section 1441 and 1443 (1) as not accompanying actions commenced in courts other than those of the fifty states." The 10th Circuit was very careful and did not want to expand the jurisdiction of federal courts beyond congressional mandate." *Id.* at 780.

In *Pela, Supra,* the Court addressed the issue of whether Congress, by granting concurrent state and federal jurisdiction over certain ERISA claims divested tribal courts of jurisdiction to hear those claims. Pela had filed a petition in tribal court alleging four causes of action. One claim was that defendant violated 29 U.S.C. Sections 1132(a)(1)(B) & 1140. Defendant filed a petition to remove the case to federal court on the grounds of federal question jurisdiction which was granted by the tribal court. Pela appealed to the Navajo Supreme Court. The Navajo Supreme Court held that 29 U.S.C. Sec. 1132(a)(1)(B), which did not mention Indian tribes, does not bar Indian tribal courts from hearing such claims. The Court reasoned that since Pela filed his suit pursuant to Sec. 1132(a)(1)(B) which provided for concurrent jurisdiction, **[10]** petitioner was permitted to sue in a non federal court that may, in turn, apply local law. In contrast, Congress desired uniformity in enforcement and regulation when it provided for exclusive jurisdiction regarding 29 U.S.C. Sec. 1132(e)(1) claims; consequently, the state and tribal courts have no jurisdiction where a federal statute provides for exclusive jurisdiction.

The Price Anderson Act, similar to ERISA does not mention Indian Tribes. This Court is not willing to construe "state courts" contained in the Price Anderson Act to include Indian tribes. Thus, the Court will examine the Price Anderson Act to determine whether it provides for state and federal concurrent jurisdiction. If it is found that it provides for exclusive jurisdiction, then tribal courts may be are barred from exercising jurisdiction over this claim. On the other hand, if it is found that there is concurrent jurisdiction, then this Court will be persuaded that the Price

Anderson Act does not bar this court from exercising jurisdiction over this claim.

THE PRICE ANDERSON ACT 42 U.S.C. SECTION 2011 *et seq.*

Defendants argue that Plaintiff's claims are subject to the Price-Anderson Act because said action seeks to hold defendants liable for injuries allegedly caused from exposure to vanadium, uranium and various radioactive substances and heavy metals resulting from the Shiprock Mill operations. Defendants assert that this is a "public liability action" pursuant to the Price Anderson Act. 42 U.S.C. Sec. 2210(n)(2) which provides an exclusive remedy for such actions with an automatic right of removal if the claim was filed in state court.[1]

[11] Defendants cited *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3rd Cir. 1991) to support its claim that 42 U.S.C. Sec. 2210(n)(2) is the exclusive remedy for "public liability" actions and that Congress created a federal cause of action for such claims when it amended the Act in 1988. According to the 3rd Circuit Court, under the terms of the 1988 Amendments Act "public liability action" encompasses "any legal liability of any person who may be liable on account of a nuclear incident. *Id.* at 855. The Court further observed that given the breadth of this definition, if a plaintiff fails to state a public liability claim potentially compensable under the Price Anderson Act, then plaintiff has no such claim at all. The *TMI* Court concluded that a claim growing out of any nuclear incident is compensable under the terms of the Amendment or it is not compensable at all and no state cause of action based on public liability exists after the 1988 amendments.

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[1] Public liability is defined as "any legal liability arising out of or resulting from a nuclear incident. Sec. 2014(w). Nuclear incident is defined as "any occurrence, including an extraordinary nuclear occurrence, within the U.S. causing . . . bodily injury, sickness, decease, **[11]** death, or lossof or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. Section 2014(q). Byproduct material includes "tailings or waste produced by the extraction or concentration of uranium or varnium from any ore processed primarily for its source material content.

DEVELOPMENT OF ATOMIC ENERGY

In 1946 Congress enacted the Atomic Energy Act of 1946, 60 Stat. 755, whereby the federal government monopolized the use, control and ownership of nuclear technology. The Atomic Energy Commission (herein after AEC) was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear material. In 1954, the Atomic Energy Act was amended, 68 Stat. 919, to encourage private construction, ownership and operation of nuclear power plants for peaceful purposes while exclusive jurisdiction to regulate and license nuclear safety **[12]** was reserved to the AEC.

In 1957 Congress passed the Price-Anderson Act as an amendment to the Atomic Energy Act Pub. L. 85-256, 71 Stat. 576, to assure adequate public compensation in case of a nuclear accident, and to limit the liability of private industry in order to encourage private participation in the development of nuclear energy. An indemnification scheme was established under which operators of licensed nuclear facilities could obtain up to $60 million in private financial protection against suits. The government would then provide indemnification for the next $500 million of liability, and the resulting $560 million would be the limit of liability for any one nuclear incident. The Act was amended again in 1959, "to clarify the responsibilities" of the states and the AEC with respect to the regulation of by-product, source, and special nuclear material. 42 U.S.C., Sec. 2021(a)(1). States were now allowed to regulate certain nuclear material in quantities not sufficient to form a critical mass. The AEC retained the exclusive jurisdiction over disposal of certain by-products, source, or special nuclear materials.

The 1966 Amendments to the Price-Anderson Act authorized the AEC to require defendants covered by the financial protection and indemnity to waive certain state-law defenses otherwise available. Said amendments responded to concerns raised regarding the adequacies of state law remedies in administering compensation for a victim of a major nuclear incident. Congress required such waivers out of concern that state-laws, such as the negligence standard of liability, were ill-suited to the problems of nuclear hazards. In 1974 the AEC was abolished and the regulatory duties of the AEC were assigned to the Nuclear Regulatory

Commission (NRC). In 1988 42 U.S.C. Sec. 2210 (n)(2) was amended to provide that the federal courts shall have original jurisdiction **[13]** over public lability claims.

Defendants contend the Atomic Energy Act and the Price-Anderson Act provide a comprehensive federal regulatory program for the licensing and operation of nuclear-related facilities and claims arising from their activities.

FEDERAL PREEMPTION

The Court must now determine whether or not the federal government's regulation of industries associated with the use, production and control of nuclear energy are so pervasive as to preclude this Court from exercising jurisdiction. Federal preemption occurs in a few specific ways. First, Congress has the authority to preempt within congressional limits the authority of states by express terms. Secondly, where there is no explicit preemptive language, the intention of Congress may be found where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it. Thirdly, preemption is found where state laws conflict with federal laws or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development*, 461 US 190, 175 L.Ed 2d 752, 103 S.Ct. 1713 (1983).

As discussed above, a challenge to tribal court jurisdiction based on a federal statute that does not include Indian tribes requires another step in the analysis. The *Pela* court held that where a federal statute does not include Indian tribes but confers concurrent jurisdiction upon the federal and state courts, the tribal courts may exercise jurisdiction over the claim. Since this Court has already found that the Price-Anderson Act does not specifically include Indian tribes and will not expand the language of "states" as used in the Price-Anderson Act, an analysis on whether the Act provides for **[14]** federal and state concurrent jurisdiction is necessary. The third method of finding preemption will be discussed following the discussion of concurrent jurisdiction.

CONCURRENT JURISDICTION

The Price-Anderson Act is not about exclusivity, rather it confers concurrent jurisdiction to both the states and federal courts where indeed there is a public liability action. The Court in *In Re TMI Consol. II, Supra.*, acknowledged that the retroactivity features of the Amendment Act promote "equitable and uniform treatment of victims,"; "the orderly distribution of funds"; and, "avoidance of similar issues in multiple jurisdictions that may occur in the absence of consideration". The features reveal Congressional concern with multiple claims and the cost of dealing with the duplicative issues in several state courts. The foregoing features would not be factors where only one person is affected by the nuclear incident or where all claims are filed in a single state court. Thus, it is possible and sometimes more efficient for a state to resolve a public liability action. *Id.* at 861.

An example of how and when resolution of a public liability claim in a state court is more efficient than removing the claim to federal court occurred in *Akins v. Rodriquez*, 15 F3d 883 (9th Cir. 1994). Plaintiff filed a claim in California state court against American Nuclear Insurers (ANI) and, current and former employees of nuclear power plant's owner and operator. Said claim was based upon contamination of stream by discharge of radioactive material. ANI provided insurance to nuclear power plants licensed by the Nuclear Regulatory Commission as required by the Price Anderson Act. ANI removed the case to federal court. The federal district court issued a stay and remanded the case back to state court. ANI petitioned the 9th Circuit Court of Appeals for a writ of mandamus challenging the remand order.

[15] The 9th Circuit Court first considered whether abstention was proper under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). This case set out factors which should be considered by a federal district court in determining whether to defer to a concurrent state proceeding. The 9th Circuit court held that the district court did not abuse it discretion in ordering the remand because the decision was based on the concern the dangers of piecemeal litigation since litigation of *Akins I* was pending in state court to determine the issue of whether certain injuries from radiation were

sufficient to support a cause of action under California tort law. Moreover, *Akin I* had been pending in state court for four years and there had been little progress in the federal litigation and the forum in Sacramento was equally convenient. Importantly, the court found that state law questions predominate in the federal action and, state substantive law is applied in public liability actions, unless such law is inconsistent with the Price-Anderson Act. *Id.* at 887.

Nor does the Price-Anderson Act preclude the use of state remedies. In *Silkwood v. Kerr-Mcgee Corporation*, 464 U.S., 78 L Ed 2d 443, 104 S.Ct. 615 (1984), the Supreme Court held that state-authorized award of punitive damages arising out of escape of plutonium from nuclear facility was not preempted by federal law. The Court looked at the legislative history noting that the 1966 amendments made it clear that state remedies were still available, notwithstanding AEC's regulating and licensing authority. A Joint Committee Report regarding the relationship between the Act and existing state tort law was cited as follows: "Since the rights of third parties who are injured are established by state law, there is no interference with the state law until there is likelihood that the damages exceed the amount of financial responsibility **[16]** required together with the amount of the indemnity. At that point the federal interference is limited to the prohibition of making payments through the state courts and to pro rating the proceeds available. *S. Rep No* 296, 85th Cong. 1st Sess. 9 (1957), U.S.C. Cong and Admin News 1957, pp 1803, 1810. *Id.* at 456.

In determining that punitive damages have always been part of traditional tort law that have not been specifically supplanted by the Act, the Court stated, "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal means." *Id.* at 454. In conclusion, the Price Anderson Act has not totally exempted states from hearing public liability claims; thus, there is no absolute exclusive federal court jurisdiction under the PAA.

The Navajo tribal court, similarly, are not precluded from hearing torts allegedly arising from a defendant's conduct within the territorial jurisdiction of the Navajo Nation.

STATE/TRIBAL LAW DOES NOT CONFLICT WITH FEDERAL LAW

The third way preemption may occur is where state laws conflict with federal laws or where state law stands as an obstacle to the accomplishment of Congressional objectives. In *Pacific Gas & Electric Co.* Supra, the Supreme Court held that a California statute imposing a moratorium on the certification of new nuclear plants until the state energy commission finds that there exists a demonstrated technology or means for the disposal of high level nuclear was not preempted by the Atomic Energy Act. Petitioner argued that the federal government was the sole regulator of all matters matters and the statute was preempted because it attempted to regulate the nuclear industry. The Court accepted the state's avowed economic rather than safety purpose as the rationale for enacting the statue and held that the statute lied outside the [17] federally occupied field of nuclear safety regulation. The Court reasoned that the Atomic Energy Act, along with all of its revisions, Congress has preserved the dual regulation of nuclear-powered electricity generation: the Federal Government maintains complete control of the safety and "nuclear" aspects of energy generation. Whereas the States exercise their traditional authority over economic questions such as the need for additional generating capacity, the type of generating facilities to be licensed, land use, and rate making.

In the case at bar, the Petitioners, likewise are not attempting to regulate the nuclear industry which is preempted by the Price Anderson Act. Petitioner seek to redress harm they allegedly suffered as a result of the Shiprock Mill operations. Moreover, an assumption of jurisdiction by the Navajo Tribal Court to adjudicate a common law tort that does not conflict the federal government's goal of regulating nuclear safety concerns.

FEDERAL REGULATORY SCHEME

Defendant contends in enacting the Atomic energy Act and the Price Anderson Act, Congress declared that the possession, use and production of atomic energy and nuclear materials were vital to the United States and must be subject to federal control and regulation. Also, in its efforts to encourage private entities to participate in the

development of the United States' nuclear resources, the federal government created a comprehensive system for resolving nuclear tort claims.

This Court does not disagree with these statements, the legislative history of the Acts indeed set forth the intent of Congress. However, Defendants arguments are misdirected. Petitioner's claim does not attempt to regulate the nuclear industry. In fact, to do so would be a physical impossibility because the Shiprock Mill has not been [18] operating for over 20 years. Instead plaintiffs are asking this Court to adjudicate a traditional common law tort that has not been precluded by the Price Anderson Act. As discussed previously, the Price Anderson Act did not preclude the use of state remedies nor did it preclude the use of Navajo Nation remedies.

Moreover, Defendant's argument that this Court's jurisdiction is foreclosed by the Treaty of 1850 borders on an outdated and patronizing attitude toward Indian tribes. Defendants argue that since the Navajo Nation depends on the United States for its protection and defense it must defer to a comprehensive federal scheme created for the resolution of nuclear torts. Apparently, Defendant's rationale is that the Atomic Energy Act and the Price Anderson Act were designed to protect the common defense and security of all United States citizens and exercise of tribal jurisdiction is a violation of the 1850 Treaty since the Navajo Nation agreed that the responsibility of its defense against its aggressors would rest in the United States. This Court is confused. Are Defendants asserting that exercise of jurisdiction over an alleged tort resulting form a Uranium Mill within the territorial jurisdiction of the Navajo Nations is an act of war?

Further, Defendant's argument implies that since the Navajo Nation entered into a treaty with the United States for protection from foreign aggressors, the Navajo people must sacrifice their lives for the development of nuclear energy. Indeed, Congress declared that the development of nuclear energy as paramount concern in enacting the Acts, but it was not to be developed at all costs, certainly not at all human costs. Defendants also argue that nuclear torts are new and has no part in Navajo traditions. Harm resulting from new technology does not automatically foreclose a court from providing a forum for Navajos who may have been harmed by new

technology. The Navajo Nation is constantly bombarded by new technology and the [19] Navajo courts have been able to deal with them as they arise. The fact that nuclear technology is not a Navajo tradition does not preclude the Navajo courts from administering justice. In sum, the Atomic Energy Act and the Price Anderson Act do not preempt this Court from adjudicating torts arising within the territorial jurisdiction of the Navajo Nation.

NON-PUBLIC LIABILITY ACTION

Even if defendant's argument that the Price Anderson Act applied was accepted, this Court would not be precluded from hearing this claim because the factual prerequisite of "public liability" action has not been shown to the court. The factual prerequisite of the statute requires first that "public liability" be found before it is covered by the Price-Anderson Amendments umbrella. For a private company to be eligible for a public liability claim, the company must have an agreement with the federal government to handle nuclear material. 42 U.S.C. Sec. 2021(C)4. The agreement includes licensing; guarantee of insurance; and, indemnification by the federal government. Those companies that did not obtain a license or those that did not obtain federal indemnification do not fall with the "public liability" scope and the Act is not applicable. The NRC was given discretion on whether to require licensed plants to maintain financial protection. Hence, government indemnification is available only to those were are indemnified. Section 2210 (e).

Accordingly, at the outset a federal definitional matter must be resolved where an action asserts liability arising out of a nuclear incident. To wit: is this a public liability action? If the answer is yes, the Price Anderson Act is applicable and no action for injuries caused by the release of radiation from a federally licensed nuclear power plant separate from the federal public liability action created by the 1988 amendments [20] is allowed.

It is this Court's opinion that Defendants failed to show that the Plaintiffs have a public liability claim subject to removal that is potentially compensable under Price Anderson Amendment Act. Defendants have not shown the Court that they were licensed with the federal government nor have they shown that they were covered

by federal indemnity insurance. Moreover, public liability claims that are compensable pursuant to the Price-Anderson Act involves the federal government as a named defendant so that the federal government may indemnify the plaintiffs and channel liability in accordance with the scheme. Thus far in this case, neither the NRC or the Secretary of Energy have been named or brought in as defendants. This Court concludes that this claim does not fall with the scope of a public liability action and the Price Anderson Act is not applicable here. Since the Price-Anderson Act gives federal courts original jurisdiction over public liability actions, state courts and tribal courts are not precluded from hearing "non-public liability" claims.

COMITY

In *Pela*, the Navajo Supreme held that the doctrine of comity applies only in actions properly pending in "the courts of another sovereign." Comity is sparingly applied out of respect and deference to tribal sovereignty. For the reasons stated above, this Court is not convinced that the Price Anderson Act bars the Navajo tribal court from hearing this action case. Tribal Court jurisdiction is an important and integral part of the tribe's sovereign status. Further, to allow the federal courts to determine substantive Navajo common law would seriously undermine Navajo tribal sovereignty. In conclusion, to extend courtesy based on comity in this case would not be in the best interest of the Navajo tribe.

[21] CONCLUSION

Congress enacted the Price Anderson Amendment Act, to create a body of federal substantive law regulating nuclear activities to ensure uniformity in enforcement of nuclear safety and to provide compensation over public liability claims. Exercise of tribal court jurisdiction does not conflict with nor interfere with that Congressional intent. As in *Pela*, those areas of state and federal public liability claims are exclusive to the federal courts. Thus, Navajo tribal jurisdiction is not precluded by the Price Anderson Act.

IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss this case is hereby DENIED.

SO ORDERED this 6th day of June, 1996.

/s/ Judge Lorene Ferguson
Shiprock Judicial District Court